

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q 30149802 BY NEIL THOMPSON)))	PRELIMINARY DETERMINATION TO GRANT PERMIT
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On September 10, 2020, Neil Thompson (Applicant) submitted Application for Beneficial Water Use Permit No. 43Q 30149802 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 700 GPM (1.56 CFS) flow rate and 77.51 AF of volume of water for irrigation. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of February 26, 2021. Christine Schweigert, Jill Lippard and Mark Elison of the Department met with the Applicant September 8, 2020 for a pre-application meeting. An Environmental Assessment for this Application was completed on April 14, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600
- Maps: Montana Cadastral map showing proposed place of use, Sage Grouse Program map showing project area is outside designated Sage Grouse habitat, Montana Cadastral map showing proposed transitory diversion, proposed flood irrigation acres and proposed sprinkler irrigation acres.
- Specification and information sheets on proposed pump.
- Flow measurements from May through September 2020.
- Variance request from ARM 36.12.1702(5) dated September 4, 2020.
- Variance response dated September 15, 2020.

Information within the Department's Possession/Knowledge

Preliminary Determination to Grant
Application for Beneficial Water Use Permit No. 43Q 30149802.

- DNRC Technical Report for Application No. 43Q 30149802
- DNRC water right records.
- Water measurements from May through September 2015 taken by DNRC Billings staff and BLM for Application No. 43Q 30104551
- MT 9125 (AG) *Water Measurement The Float-area Method* by Gerald L. Westesen, Professor of Civil and Agricultural Engineering, Agricultural Experiment Station (MT 9125)
- *Stream Discharge Using the Float-Area Method* DNRC 2016 (DNRC 2016)
<http://dnrc.mt.gov/divisions/water/water-rights/new-appropriations-program>
- Department memorandum: Physical Availability of Surface Water Without Gage Data dated April 18, 2019.

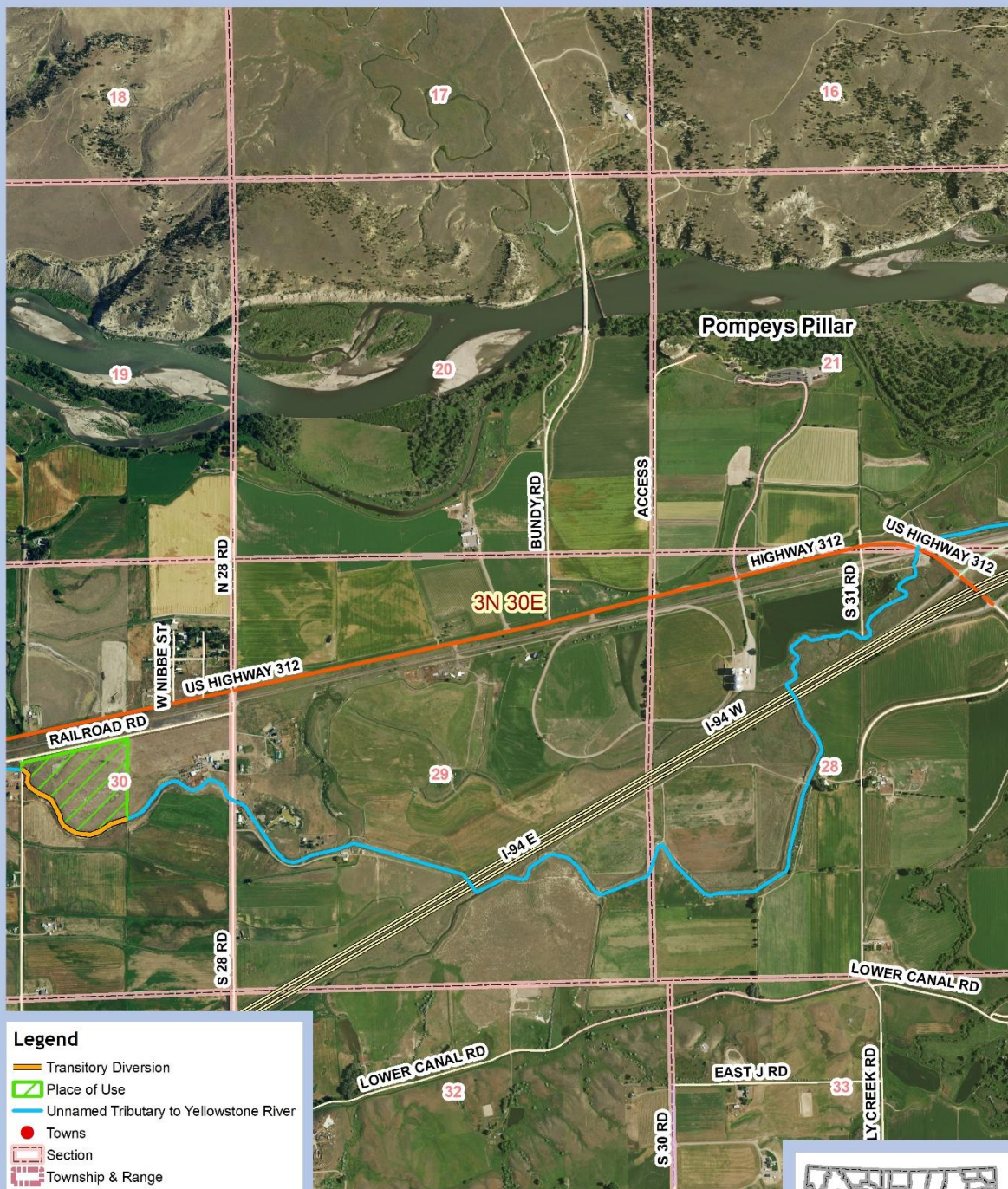
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; UT means unnamed tributary, POU means place of use and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert water from an unnamed tributary (UT) of the Yellowstone River, by means a movable pump, from May 1 to September 30 at 700 GPM (1.56 CFS) up to 77.51 AF, along the southern boundary of Parcel 1 COS 3681 in S2SWNE and N2NWSE Section 30, T3N, R30E, Yellowstone County, for irrigation use from May 1 to September 30. The Applicant proposes to irrigate 24.3 AC. The place of use is located in Parcel 1 COS 3681 in S2SWNE and N2NWSE Section 30, T3N, R30E. The project is located approximately 1.6 miles southwest of Pompeys Pillar National Monument.

NA 43Q 30149802 Thompson



N 1:19,244 Map Created: 2/25/2021
0 0.1 0.2 0.4 Miles



Service Layer Credits: Source: Esri, Maxar, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community



2. The proposed place of use falls within the Huntley Project Irrigation District (HPID or District) but is not covered by District water rights (File).
3. The UT is a perennial stream that is comprised of wastewater, seepage and return flow from irrigation within the HPID as well as natural runoff from Gravel Pit Coulee and another natural unnamed tributary.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

4. The Montana Constitution expressly recognizes in relevant part that:
 - (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
 - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
 - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
 - (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .
5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment,

withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth

in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit*

No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

Memorandum and Order (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

10. This unnamed tributary (UT) of the Yellowstone River is a man-made drainage ditch for wastewater and return flow from the HPID and also carries natural runoff from Gravel Pit Coulee and another, natural, unnamed drainage. Direct flow measurements are the only suitable technique for determining flow on this source because it does not follow a natural hydrograph and therefore flow cannot be estimated using any of the techniques outlined in the Administrative Rules of Montana (ARM).

11. The Applicant measured flow in the UT from May through September 2020 using the float area method as described in MT 9125 and DNRC 2016 and reported on form 649. The source was also measured by Department staff in June of 2015 using a Marsh McBirney flowmeter and by BLM in May, July, August and September of 2015 using the float-area method. The float-area method is an accepted method for measuring flow (Dept. memo: Physical Availability of Surface Water Without Gage Data, dated April 18, 2019).

12. The float area method uses the cross-sectional area and the float velocity along with a depth coefficient to estimate flow rate. The Applicant measured the width of the stream at the top and bottom ends of the stream reach used for measurement. The top width upstream and downstream were averaged as was the bottom width to determine average width. The depth upstream and downstream were averaged to find the average depth. The average width and depth were then multiplied to find the cross-sectional area in square feet.

13. The float velocity, in feet per second, was determined by dividing the float distance by the time it took to float 140.9 feet. This was done multiple times and averaged. The average float velocity was then multiplied by a depth coefficient provided in Table 1 of MT 9125. Finally, the average velocity was multiplied by the cross-sectional area to find the flow rate in CFS.

14. The tables below show the Applicant, DNRC and BLM measurements of flow and the DNRC estimates of volume (flow rate in CFS was multiplied by 1.98 and by the number of days each month to estimate the monthly volume).

Table 1. Applicant measurements at proposed POD in 2020

	May	June	July*	August	September
Flow (CFS)	64.73	73.97	125.48	132.47	233.3
Flow (CFS)			97.82		
Volume (AF)	3,973.13	4,393.82	7,701.96	8,131.01	13,858.02
Volume (AF)			6,004.19		

*Two measurements were taken in July, one on the 12th and one on the 20th

Table 2. BLM and DNRC measurements 3.3 miles downstream in 2015

	May	June	July	August	September
Flow (CFS)	175.8	61.45	68.78	81.95	77
Volume (AF)	10,790.60	3,650.13	4,221.72	5,030.09	4,573.80

15. The Applicant's measurements are consistent with the public entities. Applicant measurements at the POD are used to evaluate physical and legal availability because they are at the proposed diversion.

CONCLUSIONS OF LAW

16. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

17. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

18. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

19. Visual observations are insufficient without estimation of flow. *In the Matter of Application for Beneficial Water Use Permit No. 43D 10220900 by Sam McDowell* (DNRC Final Order 2007).

20. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10-15)

Legal Availability:

FINDINGS OF FACT

21. The Department considered legal demands from the POD to the confluence of the UT and the Yellowstone River, approximately 3.8 miles downstream.

22. This is an appropriate area of potential impact because it includes the entire length of the unnamed tributary. The confluence with the Yellowstone River is a significant hydrologic boundary.

23. There are four legal demands on the source below the proposed point of diversion.

Table 3. Legal demands within the area of potential impact

Water Right No.	Owner	Purpose	Flow Rate (CFS)	Volume (AF)
43Q 39327-00	George and Dolly Grice	Irrigation	1.06	43
43Q 10475-00	Larry Sherrodd	Irrigation	1	32
43Q 30144010	Brandin and Deana Jarrett	Stock	0.08 (35 GPM)	0.29
43Q 30104551	USA DOI BLM	Wildlife Habitat	0.02 (11 GPM)	1.55
		Total	2.16	76.84

24. The table below shows the comparison of the physical water supply at the point of diversion to the existing water rights in the area of potential impact over the requested period of diversion.

Table 4. Comparison of physical water supply at the POD to existing water rights

	May	June	July*	August	September
Physically Available Flow at POD (CFS)	64.73	73.97	97.82	132.47	233.3
Legal Demands (CFS)	1.16	2.16	2.16	2.16	0.1

Physically Available Flow Minus Demands)(CFS)	63.57	71.81	95.66	130.31	233.2
Physically Available Volume at POD (AF)	3,973.13	4,393.82	6,004.19	8,131.01	13,858.02
Legal Demands (AF)	11.16	19.16	27.16	19.16	0.41
Physically Available Volume Minus Demands)(AF)	3,961.97	4,374.66	5,977.03	8,111.85	13,857.61

*To be conservative, the Dept. used the lower of the two July measurements.

25. The flow rate and volume of water physically available is greater than the sum of the existing rights in the area of potential impact throughout the requested period of diversion.

CONCLUSIONS OF LAW

26. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

27. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order*

Affirming DNRC Decision, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA)

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and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

28. In analyzing legal availability for surface water, applicant was required to evaluate legal demands on the source of supply throughout the "area of potential impact" by the proposed use under §85-2-311(1)(a)(ii), MCA, not just within the "zone of influence." Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 6.

29. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the Applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA. (FOF 21-25)

Adverse Effect

FINDINGS OF FACT

30. The Applicant's plan to prevent adverse effect is to shut down the pump if call is made.

31. The amount of water physically available exceeds legal demands in all months within the requested period of diversion.

CONCLUSIONS OF LAW

32. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co.

(1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

33. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(8).

34. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

35. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

36. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

37. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

38. Simply asserting that an acknowledged reduction, however small, would not affect those with a prior right does not constitute the preponderance of the evidence necessary to sustain applicant’s burden of proof. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11 (Court rejected applicant’s argument

that net depletion of .15 millimeters in the level of the Bitterroot River could not be adverse effect.); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4 (Court rejected applicant's arguments that its net depletion (3 and 9 gpm, respectively to Black Slough and Beaverhead River) was "not an adverse effect because it's not measureable," and that the depletion "won't change how things are administered on the source.").

After calculating the projected depletion for the irrigation season, the District Court in Sitz Ranch v. DNRC explained:

Section 85-2-363(3)(d) MCA requires analysis whether net depletion will adversely affect prior appropriators. Many appropriators are those who use surface water. Thus, surface water must be analyzed to determine if there is a net depletion to that resource. Sitz's own evidence demonstrates that about 8 acre feet of water will be consumed each irrigation season. Both Sitz and any other irrigator would claim harm if a third party were allowed to remove 8 acre feet of water each season from the source upon which they rely.

Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pgs. 3-4.

39. Adverse effect not required to be measurable but must be calculable. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (DNRC permit denial affirmed; 3 gpm and 9 gpm depletion to surface water not addressed in legal availability or mitigation plan.); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; applicant failed to analyze legal availability of surface water where projected depletion from groundwater pumping); *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006); see also Robert and Marlene Tackle v. DNRC et al., Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994). Artesian pressure is not protectable and a reduction by a junior appropriator is not considered an adverse effect. See In re Application No. 72948-

G76L by Cross, (DNRC Final Order 1991); see also *In re Application No. 75997-G76L by Carr*, (DNRC Final Order 1991).

40. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 30-31)

Adequate Diversion

FINDINGS OF FACT

41. Applicant proposes to use a 4 or 6-inch PTO powered pump from the UT to fill a ditch on the northern side of the property that will distribute water through a flood irrigation system on the majority of the 24.3 acres proposed for irrigation. Sprinkler irrigation will be used on the areas that cannot be irrigated by flood. The capacity of these pumps range from 250-2100 GPM.

CONCLUSIONS OF LAW

42. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

43. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

44. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 41).

Beneficial Use

FINDINGS OF FACT

45. The Applicant proposes to use water for irrigation. Irrigation is a recognized beneficial use under the Montana Water Use Act. § 85-2-102(5), MCA

46. The Applicant proposes to divert water at 700 GPM (1.56 CFS) up to 77.51 AF based upon the system design and pump capacity. The diverted flow rate is 28.8 GPM/AC and volume is

3.19 AF/AC. The volume is within the Department standards, the flow rate is based on system design.

CONCLUSIONS OF LAW

47. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

48. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds, Dee Deaterly v. DNRC et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

49. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

50. Applicant proposes to use water for irrigation which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence irrigation is a beneficial

use and that 700 GPM (1.56 CFS) flow rate and 77.51 AF of diverted volume of water requested is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 45-46)

Possessory Interest

FINDINGS OF FACT

51. The Applicant signed the application form affirming the Applicant has possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

52. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

53. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

54. The Applicant has proven by a preponderance of the evidence that they have a possessory interest in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 51)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 43Q 30149802 should be GRANTED.

The Department determines the Applicant may divert water from a UT to the Yellowstone River, by means of a pump, from May 1 to September 30 at 700 GPM (1.56 CFS) up to 77.51 AF, along the southern boundary of Parcel 1 COS 3681 in S2SWNE and N2NWSE Section 30, T3N, R30E, Yellowstone County, for irrigation use from May 1 to September 30. The Applicant may irrigate 24.3 AC. The place of use is located in Parcel 1 COS 3681 in S2SWNE and N2NWSE Section 30, T3N, R30E, Yellowstone County.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 20th day of April 2021.

/Original signed by Mark Elison/

Mark Elison, Regional Manager

Billings Office

Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 20th day of April 2021, by first class United States mail.

NEIL THOMPSON
6623 ARAB PLACE
SHEPHERD, MT 59079

CHRISTINE SCHWEIGERT

DATE